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Recent Case Decisions

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RECENT CASE DECISIONS

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All case citations are as of 3-20-2019. The citations provided in this Case Report do not reflect changes made by Lexis or Westlaw, or the case's addition to a case reporter after that date. This Case Report contains case decisions issued through 2-9-2019. This PDF version of the newsletter is word-searchable. If you have any suggestions for improving the Newsletter, please e-mail the editorial staff at ou.mineral.law@gmail.com.

SELECTED OIL AND GAS DECISIONS

Upstream – Federal

9th Cir.
N. Oil & Gas, Inc. v. Cont'l Res. Inc., No. 17-36023, 2018 WL 6721677 (9th Cir. Dec. 21, 2018).

Gas Company and Resource Company disputed over who held valid lease to a property. Gas Company filed suit seeking quiet title, and the parties filed competing claims of summary judgment. When the district court found in favor of Gas Company, Resource Company filed a motion demanding that Gas Company participate in the costs of the well on the property. The Ninth Circuit Court of Appeals held that Resource Company did not meet the requirement of pooling units before the term of the lease; this meant that any drilling it commenced on any other unit during that time did not count as for the lease on the property in question. Additionally, the court determined that Gas Company did not expressly or impliedly indicate consent to participate in the well, and thus, was not required to participate in the costs thereunder.

This is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

M.D. Pennsylvania
Chambers v. Chesapeake Appalachia, L.L.C., NO. 3:18-CV-00437, 2019 WL 183854 (M.D. Pa. Jan. 14, 2019).

Owners sued Lessees after Lessees breached unitization and royalty clauses in their lease agreements. The unitization clause allowed for Lessee to group lessor's land with neighboring lessor's land to create one oil production unit in order to better capture underground resources. However, the unitization clause also requires that Lessee must develop one well per every 160 acres of oil production units. This ratio is the well density requirement. The royalty clause required Lessee to pay Owners one-eighth the price Lessee received per thousand cubic feet of resources sold. Owners crossed out the language in the lease agreement that allowed Lessee to reduce Owners' royalties by the costs Lessee incurred for post-production costs. Owners believed that crossing out such language before signing would change the terms of the agreement, but Lessee continued to deduct such costs from the royalties paid. Moreover, Owners alleged that Lessee

had sold the resources far below market value to a subsidiary corporation in order to pay lower royalties to Owners. Lessees moved to dismiss for failure to state a claim. The court, however, held that Owners sufficiently alleged breach of contract claims, primarily because (1) the language of the leases was unclear as to which parcels the unitization clause applied to, and (2) Owners' theory about Lessee's bad faith, under-market sales tactic was plausible.

Russell v. Chesapeake Appalachia, L.L.C., No. 4:14-CV-00148, 2018 WL 6804764 (M.D. Pa. Dec. 27, 2018).

Landowners brought action against Well Operator, alleging various claims of nuisance and negligence by creating excessive noise, traffic dust, light, air pollution, and diminished water quality. Well Operator filed a motion for summary judgment, arguing that the claims were barred by the two-year statute of limitations period for nuisance actions in Pennsylvania. Importantly, the court noted that a permanent nuisance claim accrues at the time the plaintiff was first injured, but a continuing nuisance claim accrues anew upon each new injury. The court held that the Well Operator's operations constituted a permanent nuisance and was thus time-barred by the statute of limitations. Specifically, the court noted that (1) the character of the structure or thing that produced Landowners injury spells permanence; (2) that Landowners conceded that the injury was related to Well Operator's extraction of natural gas, which Landowners had not claimed would halt anytime, meaning that it would be continuous; and (3) that Landowners' past and future damages may be predictably ascertained. Effectively, the court held that Landowners alleged a permanent nuisance as a matter of law. Given that the alleged harms accrued outside of the two-year statute of limitations period, the court granted Well Operator's motion for summary judgment.

S.D. Texas

OOGC Am. LLC v. Chesapeake Expl., L.L.C., No. H-17-248, 2018 WL 6333830 (S.D. Tex. Dec. 5, 2018).

Operator and Non-Operator jointly owned working interests in multiple oil and gas leases. A dispute arose between Operator and Non-Operator regarding how certain companies should be classified, and whether those companies charged excessive rates to the joint account in violation of contractual provisions. Non-Operator ordered arbitration, and both Non-Operator and Operator each appointed one person to the panel, with a third

person being chosen jointly by the two other panel members. Hearings were conducted, and during one, Operator's arbitrator failed to disclose the long-standing business relationship with one of the companies being classified. Non-Operator moved to have the arbitrations vacated, alleging that Operator's arbitrator tainted and influenced the other members of the panel. The trial court found that Operator's arbitrator lied when he failed to disclose the relationship, as he was under a continuous duty to check for conflicts and disclose them throughout the arbitration process. Operator was found to be aware of the conflicts and failed to disclose. As such, the court vacated the awards.

This case has since been appealed, but there is no decision from the higher court as of publication.

Verde Minerals, LLC v. Burlington Res. Oil & Gas Co., LP, No. 2:16-CV-463, 2019 WL 145017 (S.D. Tex. Jan. 9, 2019).

Oil and gas interest owners ("Interest Owners") brought a class action suit against Oil and Gas Companies ("Companies") who owned a royalty interest in property, arguing that Companies were obligated by their predecessors-in-interest to pay a share of royalties derived from the property. The property in question was conveyed in 1912 and was accompanied by a vendor's lien, which allowed grantee to tender partial payment to release selected portions of the property. Eventually, a portion of the released property was deeded to Interest Owners' predecessors-in-interest in which the grantor conveyed a small surface estate and a proportionate share of half of any oil and gas proceeds derived from anywhere in the overall property (around 2,000 acres) of the grantor (Companies' predecessor). Both parties sought summary judgment. The court granted in part and denied in part Interest Owner's motion, finding that: (1) the second conveyance need not pinpoint the particular surface estate granted to satisfy the statute of frauds as to the amount of the grantee's interest in oil and gas; (2) the second conveyance conveyed a floating royalty interest, not a mineral interest, because even absent the word "royalty," the deed unambiguously intended to convey a fraction of half of the proceeds from oil and gas production that the grantor received from the property; (3) the fact that the conveyance described the interest as a "covenant" did not automatically establish an unenforceable personal covenant; (4) the possibility that the grantees may not have received royalties for several years did not violate the rule against perpetuities; (5) the lien release clause in the original deed allowed the property in question

to be released subject to partial payment; and (6) Companies did not acquire title in the Interest Owners' royalty interest since they only held a nonpossessory interest themselves as lessors.

Upstream – State

North Dakota
Dale Expl., LLC v. Hiepler, 2018 ND 271, 920 N.W.2d 750.

The Supreme Court of North Dakota held that a mineral deed executed by Mineral Owner to Oil Company required the conveyance of the lease to Oil Company via specific performance and that monetary damages were the incorrect remedy. In 2007, Oil Company paid Mineral Owner for 150 mineral acres. However, Mineral Owner only owned 7.363 of the mineral acres, and the remaining 142.6 mineral acres were owned by a trust set up by Mineral Owner. Oil Company did not perform a title check and did not contact Mineral Owner about the discrepancy until 2011. In 2009, the trust leased the contested mineral acres to a third-party purchaser. Exploration Company received the contested 150 mineral acres from the third-party purchaser and in 2014 filed a quiet title action against Oil Company for that acreage. The trial court determined that specific performance would be inappropriate because of the covenant of seizing, and Mineral Owner violated it by conveying to Oil Company what the trust owned and awarded monetary damages. The Court held that the covenant of seizing is only appropriate when specific performance is not possible, and the burden to show specific performance is upon the requesting party. The Court accordingly reversed the trial court ruling, holding that it erred in failing to follow the presumption that for real property, specific performance, rather than monetary damages, is the proper remedy.

Desert Partners IV, L.P. v. Benson, 2019 ND 19, 921 N.W.2d 444.

Purchasers brought a quiet title suit against Owners for mineral interests. The original owner of the mineral interests made multiple conveyances of the same interests for two decades. While Owners' deed was executed before Purchaser's deed, Owners failed to file the deed until after Purchasers filed their deed. Because Purchasers had no notice of the title defects at the time they purchased the interests and filed their deed, Purchasers were good-faith buyers. After a series of summary judgements, appeals, and reversals and remands, the court affirmed the lower court's finding that Purchasers were the true owners of the mineral interests.

Ohio
Sharp v. Miller, 2018-Ohio-4740, 114 N.E.3d 1285.

Property Owners ("Owners") originally reserved interests in property using language "excepting and reserving all mineral rights." Accordingly, Owners were conveyed surface rights. Owners then entered into an oil and gas lease and filed notice of intent to declare the mineral interests abandoned after searching for names of Heirs. However, Heirs then learned coal interest and mineral interest had been reserved. Heirs filed a complaint, requesting that the court declare Owners in noncompliance with the 2006 DMA, quiet title, and termination of lease. They also raised a conversion claim. Several months later, Heirs filed an amended complaint seeking a declaratory judgment, ejectment, and the value of the rents from the oil and gas leases. Both parties then filed motions for summary judgment. Summary judgment was granted to Owners, finding that Heirs had abandoned the mineral rights on the property. Heirs appealed, and the appellate court found that because Owners filed appropriate notice, Heirs failed to file a timely claim of preservation or an affidavit identifying a savings event. As such, under the 2006 DMA, Heirs had abandoned their mineral rights and were not entitled to summary judgment. Thus, the judgment of the trial court was affirmed.

Pennsylvania
Snyder Bros., Inc. v. Penn. Pub. Util. Comm'n, 198 A.3d 1056 (Pa. 2018).

Corporation drilled and operated vertical wells in State. State Public Utilities Commission ("Commission") found that Corporation had failed to identify 45 vertical gas wells in its report, and also failed to remit the impact fees. Corporation petitioned for a review of Commission's order, and Commission petitioned for allowance of appeal. The words of the statute requiring identification of vertical gas wells was argued to be unclear. For a statute to be applicable, it must be "clear and free from ambiguity, [and] the letter of it is not to be disregarded under the pretext of pursuing its spirit." If the statute is found to be unclear, a statutes' intent can be determined by the reason for the statute, the circumstances of the statute being created, the focus of the statute, and former law. Particularly important in this case is the phrase "stripper well." A stripper well is defined as "an unconventional gas well incapable of producing more than 90,000 cubic feet of gas per day during any calendar month," while a vertical gas well is defined as "an unconventional gas well which. . . produces natural gas in quantities greater than that of a stripper well." As such, Corporation's wells would have had to produce more than 90,000

cubic feet of gas per day during any calendar month to qualify as a vertical gas well. The court found that the wells at issue met this criterion and, therefore, the court reversed the judgment of the lower court.

Texas
Green v. Chesapeake Expl., L.L.C., No. 02-17-00405-CV, 2018 WL 6565790 (Tex. App. Dec. 13, 2018).

Trust sued Drilling Company for trespass to try title to a Mineral Tract, money had and received, and a declaratory judgment in addition to separate causes of action for trespass and breach of leases. On appeal, the court considered whether a 1972 deed conveyed – in addition to the described land – title to an adjoining 30-acre mineral estate under the strip-and-gore doctrine or whether the grantor of the adjoining land intended to retain the mineral estate. The court held that the strip-and-gore doctrine is used to aid in determining a grantor's intent as to land not described in the lease, and in this case, the court agreed with the trial court's determination that the deed conveying the Tract must have included the Mineral Tract as well. As such, the court determined that the strip-and-gore doctrine presumption of inclusion of the Mineral Tract applied and rejected the first issue. Additionally, because the strip-and-gore doctrine applied here and compelled the conclusion that the conveyance was intended to convey the Mineral Tract, the court held that this land was no longer owned by Trust at all, so the other claims must fail as well.

Midstream – Federal

S.D. West Virginia
United States v. CSX Transp., Inc., No. 2:18-cv-01175, 2019 WL 97820 (S.D. W.Va. Jan. 3, 2019).

The United States and State filed a complaint against Transportation Company under the CWA and the West Virginia Water Pollution Control Act after Transportation Company's train carrying Bakken crude oil derailed and caused significant damage to the surrounding area. The damage included a widespread power outage, the disabling of a water intake system that served over 2,000 people, evacuation of nearby communities, and pollution to a nearby river. This memorandum opinion concerns the U.S. and State's unopposed motion to enter a consent decree, which requires Transportation Company to pay various penalties and complete an environmental project. Noting that the court is required to

determine the fairness of the consent decree through a deferential standard, the court found that the terms of the decree were fair and reasonable. However, the court expressed reluctance in agreeing with the amount of the fines imposed, due to both the severity of the damage caused by the derailment and the probability that it would serve as a deterrent. Ultimately, the court granted the unopposed motion to enter the consent decree.

Midstream – State

Texas
Banta Oilfield Servs., Inc. v. Mewbourne Oil Co., No. 06-17-00107-CV, 2018 WL 6314663 (Tex. App. Dec. 4, 2018).

Following an injury at an oilfield site, Servicing Company sued Producer because of its failure to indemnify them. The trial court below granted Producer's motion for summary judgment. On review, the Court of Appeals of Texas made several holdings. Servicing Company and Producer agreed that a "Master Services Agreement" ("Contract") governed their relationship. First, Producer cannot prevail on its argument for judicial estoppel because Servicing Company failed to demonstrate that Producer "made a prior, sworn, inconsistent statement" to those made during previous litigation. Second, Servicing Company's claim of quasi-estoppel fails because Producer was not a party, nor was it involved in the previous litigation. Third, Texas law governs the Contract because, throughout the Contract, it is stated that Texas substantive law shall apply, and the Contract itself points to specific sections of the Texas Civil Practice and Remedies Code. Fourth, the choice of law provision in the Contract is enforceable for several reasons in accord with the Restatement (Second) of Conflict of Laws. For example, the provision is enforceable because: (1) Texas has "substantial relationship to the parties," (2) Texas "has the most significant relationship to the parties and the transaction," and (3) the parties anticipated Texas law to apply regardless of where the Contract was performed. Fifth, the Contract was enforceable under Texas law for two reasons: (1) Servicing Company can claim indemnity because even though the injured person was not Producer's "employee," the injured person was within the covered "contractor," language in the Contract, and (2) Producer was fairly notified of the indemnity provision in the Contract.

SELECTED WATER DECISIONS

Federal

D. Rhode Island
Rhode Island v. Atl. Richfield Co., C.A. No. 17-204 WES, 2018 WL 6505394 (D.R.I. Dec. 11, 2018).

State brought this action against various chemical companies ("Companies") to recover damages for the contamination of State waters by a hazardous gasoline additive. State brought numerous claims including nuisance, trespass, impairment of public trust, Underground Tank Responsibility Act ("UTRA") violations, and Water Pollution Act violations. Companies moved to dismiss all claims. The court performed an analysis on notice, standing, causation, and personal jurisdiction and found that all but State's UTRA and impairment of public trust claims survived the motion to dismiss. The court ruled the UTRA claim failed because the state never ordered the companies remedy leaking tanks and because State was asserting its own rights as opposed to a party with de facto insurance from UTRA. The public trust claim failed because State does not recognize groundwater as a trust asset at this time. As such, Companies' motion for dismissal was granted in part and denied in part.

State

Indiana
NOW!, Inc. v. Ind.-Am. Water Co., Inc., 117 N.E.3d 647 (Ind. Ct. App. 2018).

City's water infrastructure was failing, so City contracted to sell its water utility to Company. Activist petitioned Utility Commission to stop the sale. City and Company subsequently petitioned Commission to approve the sale, which Commission agreed to since the sale was in the public's interest. Activist appealed, claiming that: (1) the purchase price for the utility was unreasonable; (2) City did not substantially comply with a statutory requirement to make information related to utility appraisals public; and (3) City did not comply with a procedural statute that governs public hearings for municipal utilities. Here, the court found that City conducted an appraisal of the water infrastructure, and the contract with Company was made in accordance with the appraisal findings. Further, City held a public hearing regarding the appraisal, and proper notice of the

hearing was published in the local paper approximately a month before the hearing date. As such, the court held for City and Company because City complied with all relevant procedural statutes, and Company's price for the water utility was fair.

Oregon

Chernaik v. Brown, No. A159826, 295 Or. App. 584 (Or. Ct. App. Jan. 9, 2019).

Through a guardian ad litem, Minors brought this action against State, seeking declaratory and equitable relief for failing to protect State's public trust resources from the effects of climate change. Minors sought to impose a fiduciary-like duty onto the State, relying on the common law public trust doctrine. Minors wished to impose an obligation on the State to affirmatively protect public trust resources from climate change. However, the Court of Appeals of Oregon found that the common-law public trust doctrine did not require a fiduciary obligation similar to that of a legal trust. The court ruled that State only had an obligation to restrain itself from impairing the common-law public right to use public-trust resources for certain purposes. State's motion for summary judgment was properly granted, but the case was remanded for a determination of the parties' rights.

SELECTED LAND DECISIONS

Federal

10th Cir.
Bay v. Anadarko E&P Onshore LLC, 912 F.3d 1249 (10th Cir. 2018).

Surface Owners brought class action suit alleging that Mineral Owner, through its lessee, exceeded the scope of the easement by using excessive surface land to drill for oil and gas. When the district court granted summary judgment in part and judgment as a matter of law in part for Mineral Owners, Surface owners appealed. Under a de novo standard of review, the Tenth Circuit Court of Appeals held that the deed's convenient or necessary clause did not expand Mineral Owner's rights beyond those implied by common law since the plain terms of the deed afforded no more rights than "convenient." Further, the court held that under Colorado law, a deed must clearly define an expansion of mineral ownership rights. Additionally, the Surface Owners were not required to show that Operator's use was not commercially reasonable. Finally, Mineral Owner's alternative argument, that it should not be held vicariously liable for its lessee, failed as the court determined that Mineral Owners had authorized the trespass.

Maralex Res., Inc. v. Barnhardt, 913 F.3d 1189 (10th Cir. 2019).

Operator and Owner sued Agency under the APA for allowing the Bureau of Land Management ("BLM") to conduct warrantless and impromptu inspections of oil wells on their property. A BLM representative notified Owner that he was going to inspect Owner's wells, and Owner responded that because he owned both the surface and mineral rights, BLM had no right to inspect the wells, as BLM can usually only inspect private sites annually. However, BLM can inspect federal and tribe well sites at any time without notice. When the BLM representative showed up for the inspection, he was locked out of the well site. He subsequently demanded either a key or the ability to put a BLM lock on the site. Owner and Operator challenged BLM's action, but the lower court upheld BLM's conduct. On appeal, Operator and Owner argued that BLM did not have the statutory authority to require a key or lock on private well sites, and the Tenth Circuit Court of Appeals agreed, holding that BLM lacks the ability to enforce a "key or lock" requirement for private lands under the language of the Federal Oil and Gas Royalty Management Act.

E.D. Virginia

Altamaha Riverkeeper v. U.S. Army Corps of Engineers, No. CV 418-251, 2018 WL 6496791 (S.D. Ga. Dec. 10, 2018).

Environmental Groups sought a preliminary injunction on a permit granted by the Corps to a real estate developer. The district court walked through the prerequisites for a preliminary injunction and denied Environmental Groups' request. To succeed on its motion for a preliminary injunction, the moving party must show that (1) its case has a substantial likelihood of success on the merits, (2) it will suffer irreparable harm unless the injunction is issued, (3) the threatened injury outweighs the injury caused by the injunctive relief, and (4) the injunction would not be a disservice to the public. Here, because the court found that Corps was arbitrary or capricious in its granting of the permit, Environmental Groups' claim did not have a substantial likelihood of success. Furthermore, because Environmental Groups failed to state the irreparable harm that would befall them if the injunction were not granted, the court found that a preliminary injunction would be unjust. As such, Environmental Groups' motion for preliminary injunction was denied.

Columbia Gas Transmission, LLC v. Grove Ave. Developers, Inc., No. 2:17cv483, 2019 WL 130168 (E.D. Va. Jan. 8, 2019).

Surface Owner sought to construct an asphalt road over Transmission Company's easement, which contained two high pressure natural gas pipelines. Transmission Company brought suit seeking an injunction and declaratory judgment against Surface Owner preventing the construction. Transmission Company objected to the roadway, unless costly mitigation measures were paid for by Surface Owner. Surface Owner contended that such mitigation measures were not needed, and that the roadway would not endanger the pipelines or interfere with Transmission Company's access to the pipeline. After hearing expert testimony from both parties, the court concluded that Surface Owner's proposed crossing would unreasonably interfere with Transmission Company's right to safely maintain and repair the pipelines. The court based its finding on evidence presented, which suggested that the planned roadway, without mitigation measures, collectively posed enough added risks to the aging pipelines to create an unreasonable burden on Transmission Company. For these reasons, the court ordered that Surface Owner was enjoined from building the roadway in accordance with its proposed plan.

State

Louisiana
Crooks v. Dep't of Nat. Res., 2017-750 (La. App. 3 Cir. 12/28/18); No. 17-750, 2018 WL 6816853.

Landowners brought action against State for injunctive relief and damages resulting from the flooding of their land as riparian property. Under the Act of Assurance, State agreed to "furnish free of cost to the United States all land, easements, and rights of way, including flowage rights in overflow areas, and suitable spoil-disposal areas necessary for construction of the project and for its subsequent maintenance, when required." Landowners claimed that the area was an overflow area of land, while State argued that the land itself was a distinct lake bed. State filed a motion for summary judgment, and its motion was granted. Landowners appealed, and summary judgment was reversed. Landowners were awarded damages, and State then appealed. The appellate court found that: (1) the trial court appropriately and sufficiently described property for jurisdictional purposes; (2) Landowners had a right to proceed against State for breaches of its promise to the United States; (3) the trial court did not err in finding that the area was "a permanent river that seasonally overflowed and covered its banks"; and (4) Landowners claims were sustained prior to their purchase and, as such, Landowners have a right of action. Accordingly, the appellate affirmed lower court's decision in part and vacated in part.

Massachusetts
Putney v. O'Brien, No. 14 MISC. 488153 (JCC), 2018 WL 6183338 (Mass. Land Ct. Nov. 27, 2018).

Drainer filed suit seeking a declaration that it had a "prescriptive easement to continue draining surface water" onto Neighbor's property through a pipe system and sought to enjoin Neighbor from blocking up the pipe system. Neighbor counterclaimed that the draining of water was unauthorized, and thus, trespass and a nuisance. At trial, the court found that Drainer did have a prescriptive easement to drain surface water but was enjoined from draining additional water, such as that from a pool or a "basement sump pump," through the pipe system. The court further held that Neighbor was enjoined from blocking the pipes and had to let the water drain freely.

Michigan

Robinson v. MT Clark, Inc., No. 339926, 2018 WL 6252544 (Mich. Ct. App. Nov. 29, 2018).

Landowner sued Gas Station, alleging nuisance due to migration of methyl tert butyl ether ("MBTE") into Landowner's aquifer and well. Landowner moved onto the land in 2008 and was notified by State in 2015 that the levels of the MBTE present in the aquifer exceeded regulatory limits and were unsafe for human use. State provided Landowner with a connection to the local municipal water supply free of charge. The trial court found that the statute of limitations barred Landowner from bringing suit. Landowner subsequently appealed the trial court order granting summary disposition for Gas Station, alleging that the statute of limitation should not have run because it should have accrued only when Landowner was made aware of the damage. The appellate court affirmed the trial court ruling for Gas Station because the statute of limitations began to run when Landowner tasted the tainted water, not when State informed Landowner that the levels of MBTE exceeded regulatory limits.

This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

SELECTED ELECTRICITY DECISIONS

Rate – State

Arizona
Woodward v. Ariz. Corp. Comm'n, Nos. 1 CA-CC 17-0003, 1 CA-CC 17-0004, 2018 WL 6498615 (Ariz. Ct. App. Dec. 11, 2018).

State Corporation Commission ("Commission") held a rate case for Public Utility Company to determine the rates that Public Utility Company was allowed to implement. Public Utility Company and many other interveners litigated with Commission for over a year about the rate case and many issues within its completion and findings. After the year, 29 of the 39 intervenors reached a settlement with Commission, including Public Utility Company, though Public Utility Company opposed the final terms. There was a proceeding seven-day evidentiary hearing concerning whether the settlement agreement resulted in just and reasonable rates, resulting in an eventual acceptance and confirmation of the settlement agreement by Commission. The Arizona Court of Appeals granted Public Utility Company's appeal of whether the Commission's actions were within its Constitutional powers. Because Commission's powers are so broad and sweeping, Public Utility Company was required to clearly and convincingly demonstrate that Commission's decisions were unlawful, unreasonable, or unsupported by substantial evidence, and the court determined that it had not.

This is an unpublished opinion of the court; therefore, state court rules should be consulted before citing the case as precedent.

SELECTED TECHNOLOGY AND BUSINESS DECISIONS

Federal

W.D. Arkansas
Murphy Oil Corp. v. Liberty Mut. Fire Ins., No. 1:18-CV-1013, 2019 WL 137626 (W.D. Ark. Jan. 1, 2019).

The seller of an oil refinery ("Seller") was sued by Buyer, who wished Seller to indemnify Buyer for damages sustained in connection with a fire after the sale of the refinery. Seller had contracted to indemnify Buyer for damages as a result of misrepresentation and environmental issues arising before the sale. Seller notified its Insurer and requested that it provide a defense under the terms of the insurance policy. Insurer declined, asserting it had no duty under the policy to defend against Buyer's claims. Seller filed suit to obtain a declaratory judgment concerning Insurer's obligation to defend Seller against Buyer's claims. The district court noted that there was conflicting state precedent, referencing precedent supporting an insurer's obligation to defend claims arising from contractual liability when policy language allows, and also referencing precedent stating that a commercial general liability ("CGL") policy never covers contractual liabilities, regardless of the policy's exceptions. The court ultimately agreed with the precedent establishing that some contract claims might be covered by a CGL policy if the exclusion or exceptions in the contract allowed. Here, the court found that because Seller's contract claim arose out of damages resulting from false representations and failures to deliver the property as bargained for, the claims were not covered by the language of the policy, which would cover damages arising out of "property damage". Thus, the court concluded that Insurer did not owe Seller a duty to defend against Buyer's claims, granting summary judgement for Insurer.

This case has since been appealed, but there is no decision from the higher court as of publication.

S.D. Texas
Total E&P USA, Inc. v. Marubeni Oil & Gas USA, Inc., No. H-16-2671, 2018 WL 6386263, (S.D. Tex. Dec. 6, 2018).

Corporation assigned its 25.834% interest in a pipeline to Oil Company. Oil Company filed Chapter 11 Bankruptcy and, with the approval of an ALJ, sold its interest in the pipeline to Purchaser, along with a divided overriding royalty interest in an oil and gas field going to Purchaser and the other half

going to a fund that would be used to offset Oil Company's decommissioning obligations to the pipeline. Agency required Purchaser to decommission the pipeline, which it did, and Purchaser sought contribution for the costs of decommission from Corporation. Corporation filed suit against Purchaser, seeking a declaratory judgment that it was not obligated to reimburse Purchaser for decommissioning costs. The trial court found that Corporation was liable for its share in decommissioning costs and that Oil Company's bankruptcy fund did not fully satisfy Corporation's obligations. Corporation filed a motion to determine which issues would be covered in the damages trial, claiming that expert testimony proposed would not be relevant to any issue at trial. Because the expert testimony proposed would go against the unambiguous language of the contract and would challenge Corporation's liability, which the trial court already determined via summary judgment, Corporation's motion was denied.

State

Louisiana
Lucky v. Carr (La. App. 2 Cir. 1/16/19); No. 52, 434-CA, 2019 WL 210156.

Purchaser sued Agent for breach of fiduciary duty after Agent bought land Purchaser was trying to buy and did not subsequently sell it to Purchaser, as per his oral instructions. Due to Purchaser's reputation and wealth, he thought that if he directly bought the land, Seller would unfairly charge more for the land. As such, Agent was essentially tasked with acting as a shell purchaser. However, Purchaser and Agent never executed a written agreement regarding this instruction. Applicable state law required that agreements over the purchase or sale of immovable property must be reduced to writing to be enforceable. The lower court found that Agent did breach her fiduciary duties to Purchaser and awarded Purchaser substantial damages. Agent appealed, and the court held for Agent because Purchaser's oral instructions to Agent were unenforceable, and Agent thus owed no fiduciary duties to Purchaser.

Texas
Apache Corp. v. Wagner, No. 02-18-00132-CV, No. 02-18-00135-CV, 2019 WL 6215739 (Tex. App. Nov. 28, 2018).

Purchaser acquired oil and gas assets from Seller pursuant to a purchase and sale agreement ("PSA"), which included an arbitration agreement.

Purchaser and Seller executed an assignment, conveyance, and bill of sale which incorporated the terms of the PSA. Purchaser then immediately executed an identical assignment of all property to a third company ("Assignee"), which incorporated the terms of the first assignment. Seller was subsequently sued and sought arbitration to cover the costs of the litigation from both Purchaser and Assignee. Purchaser and Assignee filed a declaratory judgment in state court, seeking a declaration that they were not liable and that the arbitration clause did not apply. Seller motioned to compel arbitration, which was denied and now appealed. This court reversed, holding that: (1) a valid arbitration agreement existed between Purchaser and Seller; (2) Assignee, a non-signatory to the original arbitration agreement was still bound to arbitrate, since the assignment incorporated the PSA's terms and was effected on the same date; and (3) the terms of the arbitration agreement applied, and the carve-out exception in the agreement only applied to cross-claims within a third-party action, was were not applicable here. For these reasons, the appellate court reversed and remanded the case in order to compel arbitration.

McDonald Oilfield Operations, LLC v. 3B Inspection, LLC, No. 01-18-00118-CV, 2018 WL 6377432 (Tex. App. Dec. 6, 2018).

Pipeline inspection company ("Company-1") sued another pipeline inspection company ("Company-2") for defamation and tortious interference with contract. Company-1 alleged that it had suffered damages after (1) Company-2 made comments to Company-1's client, stating that Company-1 was "not a real company" and the owner "did not know what he was doing," and (2) Company-2 revoked its sponsorship of Operator Qualifications for prior employees of Company-2 after those employees left Company-2 to work for Company-1. At the trial level, Company-2 moved to dismiss under the Texas Citizen Participation Act ("TCPA"), which allows for defendants to move to dismiss a meritless action where the defendant has properly exercised their right to free speech. The trial court denied the motion, and Company-2 appealed. Here, the appellate court reversed, stating that Company-2's communications were within the scope of the TCPA because the communications in question either (1) concerned the qualifications of the employees of Company-1, which, as they were responsible for inspecting equipment which implicated public safety, was a matter of public concern; or (2) were related to "a good, product, or service in the marketplace." Next, the court held that TCPA required that the claims be dismissed, since none of the claims, as alleged by Company-1, could

establish a prima facie case, and therefore, could not meet the minimum requirements to survive dismissal under the TCPA.

Stephens v. Three Finger Black Shale P'ship, No. 11-16-00177-CV, 2018 WL 6928989 (Tex. App. Dec. 31, 2018).

Investors in a speculative project to buy and sell oil leases brought claims for breach of fiduciary duties, breach of contract, and fraud in a derivative suit against Company and Company's Shareholders. Shareholders misrepresented the payment of their contracted investment amount through deceitful and creative accounting, resulting in Investors not receiving their fair amount of profits from the project. Shareholders, but not Investors, learned about a similar future venture while working on the project. Shareholders did not inform Investors of the venture opportunity, breaching their fiduciary duties to Investors. Shareholders then terminated the project with Investors and proceeded to fund the subsequent venture with profits from the completed project. Shareholders failed to pay Investors their share of the profits until after Shareholders funded the venture. The lower court ruled in favor of Investors. On appeal, Shareholders argued that Investors were not actually in a partnership with Company, so Shareholders did not owe Investors fiduciary duties. Shareholders pointed to the language of the participation agreement under which (1) Shareholders and Investors operated for the duration of the project, (2) Investors were only subject to losing their own investments rather than further loss splitting, and (3) Investors had no right or ability to engage with the management of the project. The court held for Shareholders and reversed the lower court's judgments in favor of Investors' non-existent partnership. However, the court reiterated that Investors still have individual claims against Shareholders and Company.

SELECTED ENVIRONMENTAL DECISIONS

Federal

4th Cir.
Cowpasture River Pres. Ass'n v. Forest Service, 911 F.3d 150 (4th Cir. 2018).

Environmental Organizations ("Organizations") appeal a decision of the United States Forrest Service ("Forest Service") allowing Developer to place a pipeline through portions of National Forests and other protected areas. Organizations claimed that by allowing construction of the pipeline, the Forest Service violated the National Forest Management Act ("NFMA"), the National Environmental Policy Act ("NEPA"), and the Mineral Leasing Act ("MLA"). The Fourth Circuit Court of Appeals determined that the Forest Service violated NFMA and NEPA, and "lacked statutory authority pursuant to the MLA to grant a pipeline right of way" across a protected area. First, the Forest Service violated the NFMA because it did not substantively analyze rules promulgated by the Department of Agriculture, which governs plans like those proposed by Developer. Further, the Forest Service failed to determine whether Developer's "project could not be reasonably accommodated on non-national forest land." Second, the Forest Service violated NEPA for two reasons: (1) it failed to conduct a sufficiently independent review of FERC's EIS on alternative locations to Developer's plan when it adopted the EIS on the same day it was released, and (2) Forest Service inadequately analyzed landslide, erosion, and water quality risks. Third, Forest Service violated the MLA because even though the Forest Service is charged with managing "land underlying components" of the protected area, it is not given the responsibility of administering the protected area. Accordingly, Forest Service did not have proper authority to allow Developer's project to go forward.

Sierra Club v. U.S. Army Corps of Engineers, 909 F.3d 635 (4th Cir. 2018).

Environmental Group sought judicial review of Army Corps of Engineers ("Corps") verifications of the construction of a pipeline under the Clean Water Act Nationwide Permit ("NWP"). The pipeline construction would result in the discharge of materials into federal waters, and the CWA requires Pipeline Company to obtain permits from Corps. Pipeline Company sought to utilize a general permit rather than a case-specific permit for its construction. State added additional approval requirements

under the NWP before Corps could grant the permit and conditionally issued certification as long as the conditions were met. Pipeline Company sought to utilize a dry cut construction method, and Corps requested State's opinion on the matter. State approved the use of the dry cut method, however, Corps utilized 33 C.F.R. § 330.1(d)(1) to modify a "case specific activity's authorization under NWP" and imposed several additional conditions in the reauthorization of the permit. Environmental Group challenged the verification and reinstatement of the permits by Corps, alleging Corps exceeded its authority in reinstatement to add additional special conditions instead of NWP requirement that state requirements become included into federal permits. On appeal, the Fourth Circuit Court of Appeals held that the statute was not ambiguous, and Corps substituting its own conditions "in lieu of" the state requirements violated the CWA. The court then addressed whether Corps' interpretation would be entitled to *Skidmore* deference, and held that Corps' interpretation was not entitled to *Skidmore* deference. Thus, the Fourth Circuit underwent *de novo* review of Corps' interpretation of its authority under the CWA to remove and insert an additional state requirement on a NWP and held that Corps had exceeded its statutory authority under the CWA, which requires that any state certification shall become a requisite for a federal permit.

D. Nevada

Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., No. 3:17-CV-553-LRH-WGC, 2019 WL 236727 (D. Nev. Jan. 15, 2019).

Environmental Advocate filed for summary judgment against BLM. BLM had leased almost 200,000 acres of land, including wetlands and other critical water features. Environmental Advocate argued that BLM did not analyze the impact of the sale on the critical wetlands, and its review was arbitrary and capricious. Environmental Advocate also argued that BLM's actions violated NEPA. The court found that: (1) BLM need only take a "hard look" at environmental consequences of decision-making, and BLM had met this standard; (2) BLM appropriately analyzed the direct and indirect effects of fracking on the lands it leased; (3) BLM did not rely on outdated or inadequate data; and (4) BLM had analyzed "reasonably foreseeable" adverse effects on the wetlands, which is all that is required. Because BLM met all standards of review required before leasing the land, the Court granted BLM's motion for summary judgment.

D. New Jersey
PPP Indus., Inc. v. U.S., Civil Action No. 12-3526 (JMV) (MAH), 2018 WL 6168623 (D.N.J. Nov. 26, 2018).

Company sought to impose Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") liability on the United States Government for acting as an operator of the Company's facility responsible for environmental damage resulting in their own environmental liability. The district court determined that in order to impose CERCLA liability based on "operator" status, the entity must exert something more than general control over the lower entity responsible for the environmental liability. Applying this standard to the United States' government actions during WWI and WWII, the court found that the general influence the government exerted over the economy during wartime to fill national defense needs was insufficient to apply CERCLA liability for having an operator status. The government never seized the plant, never directly conducted the plant's activities regarding pollution, and never installed employees in management positions. As such, the government lacked operator status, and no CERCLA liability could be applied.

This is an unpublished opinion of the court; therefore, state or federal court rules should be consulted before citing the case as precedent.

W.D. Washington
Lighthouse Res., Inc. v. Inslee, No. 3:18-cv-05005-RBJ, 2018 WL 6505372 (W.D. Wash. Dec. 11, 2018).

Export Company and Rail Carrier (collectively "Companies") brought action against various Washington state officials ("State") after being denied a water quality certificate under the CWA for Export Company's proposed coal export terminal. State denied the application because (1) the environmental impact statement ("EIS") identified "significant unavoidable adverse impacts," including impacts on rails and vessels, which conflicted with state policies, and (2) there were not reasonable assurances that the terminal would meet water quality standards. Companies argued that State's denial was preempted by the Interstate Commerce Commission Termination Act ("ICCTA") and the Ports and Waterways Safety Act ("PWSA"). State moved for summary judgment to dismiss these preemption claims. The court dismissed both of Companies' preemption claims for the following reasons: (1) Companies did not have standing because, even assuming preemption, there were other grounds for denial

that would not be preempted, and the federal court would therefore be unable to vacate the denial; (2) there was no preemption under ICCTA, since denial of Export Company's application, partially based on impacts to rail transportation, could not be considered regulation under the scope of the ICCTA as Export Company was not itself a rail carrier and would not be performing rail transportation on behalf of Rail Carrier; (3) Rail Carrier could not claim preemption under ICCTA, even though ICCTA preempts state action that burdens rail transportation, because Rail Carrier's loss of profits from a third party's denied application was remote and incidental to the state action; and (4) Export Company could not show that the denial of the application based on impacts of vessel transportation conflicted with federal regulation under PWSA. Accordingly, the court granted summary judgement for State on these issues and dismissed Companies' claims.

D. Wyoming

Powder River Basin Res. Council v. Jewell, No. 14-CV-97-ABJ, 2018 WL 6419448 (D. Wyo. Dec. 6, 2018).

Advocacy Organization petitioned for judicial review of a decision made by the U.S. Secretary of the Interior and other state agencies ("Agency"), arguing that: (1) Agency violated the APA when it did not solicit public comment before recommending and approving a mining plan modification, and (2) the plan failed to sufficiently ensure reclamation by establishing a bond release timetable. The court denied Advocacy Organization's petition, finding that: (1) there were two separate, prior opportunities for public comment during the approval process, and the applicable federal regulations only require consideration of existing public comment during the approval phase in which Advocacy Organization wished to comment; (2) the failure to require a bond release program to gauge reclamation progress was not arbitrary and capricious since there were other ways to gauge the progress and compliance of contemporaneous reclamation needed in the modification plan which were considered; and (3) the issue of timely reclamation of federal land was to be considered and enforced on the state level of the approval process, and Agency only provides limited oversight over such matters. For these reasons, the court dismissed the petition for review and affirmed the approval of the modification plan.